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No. 09-284

IN THE
Supreme Court of the United States

INDEPENDENCE NEWS, INC., *et al.*,

Petitioners,

v.

CITY OF CHARLOTTE, NORTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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ORDINANCE PROVISION

Charlotte Zoning Ordinance

Section 12.518. Adult establishments.

Studies have shown that lowered property values and increased crime rates tend to accompany and are brought about by the concentration of adult establishments as defined herein. Regulation of these uses is necessary to insure that these effects do not contribute to the blighting of surrounding neighborhoods and to protect the integrity of the City's schools, churches, child care centers, parks and playgrounds which are typically areas in which juveniles congregate. It is the intent of this provision to establish reasonable regulations to prevent a concentration of adult establishments within the City of Charlotte and to separate adult establishments from those sensitive uses listed below.

Adult establishments are permitted in the B-2, UMUD, I-1, and I-2 districts subject to the following requirements:

(a) Any structure in which an adult bookstore or adult mini motion picture theatre establishment is the principal or accessory use shall be separated by a distance of at least one thousand five hundred (1,500) feet from any residential district, school, church, child care center, park or playground. An adult establishment lawfully operating as a conforming use is not rendered a nonconforming

use by the subsequent location of a residential district, school, church, child care center, park or playground within the 1,500-foot separation distance.

(b) Any structure in which an adult establishment, other than an adult bookstore or adult mini motion picture theatre, is the principal or accessory use shall be separated by a distance of at least one thousand (1,000) feet from any residential district, school, church, child care center, park or playground. An adult establishment lawfully operating as a conforming use is not rendered a nonconforming use by the subsequent location of a residential district, school, church, child care center, park or playground within the 1,000-foot separation distance.

(c) Any structure in which an adult bookstore or adult mini motion picture theatre establishment [is the] principal or accessory use shall be separated by a distance of at least one thousand (1,000) feet from any other adult establishment.

(d) Any structure in which an adult establishment, other than an adult bookstore or adult mini motion picture theatre, is the principal or accessory use shall be separated by a distance of at least five hundred (500) feet from any other adult establishment.

(e) The distance for the separation from residential zoning and protected uses shall be measured in a straight line from the closest edge of the building

occupied by an adult use to the nearest residential zoning district or to the property line of a protected use. The distance for the separation between adult uses shall be measured in a straight line from the closest edges of the buildings occupied by adult uses.

(f) No more than one adult establishment may be located within the same structure.

(g) In addition to the standards set forth in section 5.108, before granting a variance from the separation requirements set forth in subsection (a) or (b) of this section, the board of adjustment shall find that thoroughfares, traffic circulation patterns, structures or other natural or man-made geographic or topographic features are likely to provide an adequate measure of protection for the protected zoning or use from any secondary effects of the adult establishment.

REASONS FOR DENYING THE PETITION

There is no compelling reason for the Court to grant the Petition for Writ of Certiorari. The Fourth Circuit Court of Appeals' decision is consistent with a decision of this Court. The Fourth Circuit is not in conflict with any other Circuit. And this case does not involve an important question of federal law that needs to be settled by this Court. Petitioners have not, therefore, satisfied their burden of demonstrating a compelling reason why the Petition should be granted.

I. Charlotte's Adult Business Zoning Ordinance.

The City of Charlotte's Zoning Ordinance restricts adult businesses to four zoning districts – B-2 (business), UMUD (uptown mixed use district), I-1 and I-2 (industrial). *Charlotte Zoning Ordinance Section 12.518.* Even within the permitted zoning districts, adult bookstores and live entertainment establishments are respectively subject to separation requirements of 1,500 and 1,000 feet from certain "protected uses" (*i.e.*, residential districts, schools, churches, child care centers, parks and playgrounds), and 1,000 and 500 feet from other adult businesses. *Charlotte Zoning Ordinance Section 12.518(a)-(d).*

Although not codified, as part of its 1994 enactment the Charlotte City Council "amortized" existing non-conforming adult businesses giving them eight years to either close or move to a conforming location. Since Petitioners' businesses are not compliant with the separation requirements, they were subject to the amortization provision.[1]

The final relevant aspect of the ordinance is the provision that directs the Zoning Board of Adjustment to determine, when considering a variance request, whether "thoroughfares, traffic circulation patterns, structures or other natural or man-made geographic or topographic features are likely to provide an adequate measure of protection for the protected zoning or use from any secondary effects of the adult establishment." *Charlotte Zoning Ordinance Section 12.518(g).*

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[1] The City has chosen not to enforce the amortization provision pending the resolution of this litigation.

"[Z]oning ordinances designed to combat the undesirable secondary effects of [adult] businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986). Such regulations are constitutional "so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id.* at 47. The secondary effects that Charlotte's regulations are intended to combat are identified in the preamble to the ordinance and include lowered property values, increased crime rates, and harm to children. There is no dispute in this case that the elimination or prevention of these effects serves a substantial governmental interest. And there is no dispute in this case that the areas of the City where adult businesses are permitted "by right" (*i.e.*, without the need for a variance) constitute adequate avenues of communication.

Faced with this construct, Petitioners contend that if they can demonstrate that their businesses have not generated the kinds of secondary effects that the ordinance is intended to combat, it is "as-applied" unconstitutional for Charlotte to enforce its adult business zoning regulations against them. In addition, Petitioners contend that because the variance provision does not require the Zoning Board of Adjustment to consider factual evidence concerning the secondary effects of the adult business seeking a variance, the ordinance is "facially" unconstitutional. The Fourth Circuit Court of Appeals rejected both of Petitioners' contentions. *Independence News, Inc. v. City of Charlotte*, 568 F.3d 148 (4th Cir. 2009).

II. The Fourth Circuit's Decision is Consistent with *Ward*.

In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), a sponsor of musical events at the bandshell in New York City's Central Park challenged the constitutionality of the City's guidelines that required performers to use city-selected and provided sound-amplification equipment and sound technicians. The guidelines were adopted to achieve the City's goal of ensuring adequate, but not excessive, sound amplification. Applying time, place, and manner principles, this Court upheld the guidelines finding that they were "narrowly tailored to serve the substantial and content-neutral governmental interests of avoiding excessive sound volume and providing sufficient amplification within the bandshell concert ground, and the guideline leaves open ample channels of communication." *Id.* at 803. Significantly, the *Ward* Court considered an argument that is conceptually identical to Petitioners' contention in this case.

> The city's second content-neutral justification for the guideline, that of ensuring "that the sound amplification [is] sufficient to reach all listeners within the defined concert-ground," . . . also supports the city's choice of regulatory methods. By providing competent sound technicians and adequate amplification equipment, the city eliminated the problems of inexperienced technicians and insufficient sound volume that had plagued some bandshell performers in the past. No doubt this concern is not applicable to respondent's

> concerts, which apparently were characterized by more-than-adequate sound amplification. But that fact is beside the point, for the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case. Here, the regulation's effectiveness must be judged by considering all the varied groups that use the bandshell, and it is valid so long as the city could reasonably have determined that its interests overall would be served less effectively without the sound-amplification guideline than with it.

Id. at 800-801 (internal citations omitted).

The upshot of *Ward* is that so long as restrictions bear an adequate relation to the general problem the government seeks to correct or prevent, it is legally irrelevant whether the governmental interest is advanced in an individual case. Since it has been determined that Charlotte's adult business zoning regulations do bear an adequate relation to the general problem the City seeks to correct or prevent, it is legally irrelevant whether that interest is advanced when the City applies the regulations to Petitioners, or when the Zoning Board of Adjustment considers Petitioners' variance requests. That is the conclusion reached by the Fourth Circuit, a conclusion that is entirely consistent with *Ward*.

III. The Fourth Circuit is not in Conflict with another Circuit.

Petitioners assert that the Fourth Circuit's decision is in conflict with *Peek-a-Boo Lounge of Bradenton, Inc., v. Manatee County,* 337 F.3d 1251 (11th Cir. 2003). Petitioners are mistaken. Rather than challenging the justification for *applying* the ordinance to a particular business, as Petitioners seek to do here, the Plaintiffs in *Peek-a-Boo* were challenging the evidentiary basis for the *enactment* of the ordinance. *Id.* at 1266-67, 1270-73. In this case, Petitioners did not appeal the trial court's determination that the City had a sufficient evidentiary basis for enacting the ordinance. The Fourth Circuit is not in conflict with the Eleventh Circuit.

IV. This Case does not raise an Important Question of Federal Law that needs to be settled by this Court.

Petitioners urge the Court to extend the evidentiary "burden shifting" holding of *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). *See* Petition for Writ of Certiorari, p. 13. However Respondent submits that when read in light of *Ward*, *Alameda* cannot logically be extended to Petitioners' claims.

Whether the law recognizes a cause of action that challenges a municipality's decision to keep adult business regulations – regulations that were justified at the time of adoption – "on the books" based on an allegation that there is currently not a sufficient evidentiary basis for such regulations (*i.e.*, the restrictions no longer bear an adequate relation to the

general problem the City seeks to correct or prevent), and whether such a claim should be subject to *Alameda*-like burden shifting, are interesting questions. But they are not the questions posed by Petitioners.

Rather, Petitioners are claiming that evidence regarding whether their businesses are currently generating secondary effects is legally relevant. But that is precisely the claim that the *Ward* Court rejected by holding that "the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ward*, *supra* at 801. Stated another way, and regardless of whether that determination is made at the time of enactment or the time of enforcement, *Ward* teaches that so long as the restrictions bear an adequate relation to the general problem the government seeks to correct or prevent, it is legally irrelevant whether that interest is advanced when the City applies the regulations to Petitioners, or when the Zoning Board of Adjustment considers Petitioners' variance requests. For that reason, this case does not raise an important question of federal law that needs to be settled by this Court.

CONCLUSION

Based on the foregoing, Charlotte respectfully asks the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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